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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Protection of the heritage of indigenous people

Preliminary report of the Special Rapporteur, Mrs. Erica-Irene Daes, submitted in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights

Introduction

1. In accordance with Economic and Social Council decision 1992/256 of 20 July 1992, the present Special Rapporteur prepared a study on the protection of the cultural and intellectual property of indigenous peoples (E/CN.4/Sub.2/1993/28), taking into account information made available to her by indigenous peoples, and relevant international standards. Indigenous peoples commented on the report during the eleventh session of the Working Group on Indigenous Populations (see E/CN.4/Sub.2/1993/29, paras. 163-176), and in the light of these comments the Working Group recommended that further work be undertaken.

2. In its resolution 1993/44 of 26 August 1993, the Sub-Commission on Prevention of Discrimination and Protection of Minorities endorsed the conclusions and recommendations contained in the study of the Special Rapporteur and requested her to expand her study with a view to elaborating draft principles and guidelines for the protection of the heritage of indigenous peoples, and to submit a preliminary report containing such principles and guidelines at its forty-sixth session. The mandate for an expanded study was endorsed by the Commission on Human Rights in its decision 1994/105 of 4 March 1994.

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3. The Special Rapporteur wishes to express her appreciation to all the indigenous peoples' organizations and governments which have contributed thus far to her study.

Discussion

4. In the Rio Declaration on Environment and Development, the United Nations Conference on Environment and Development stressed the "vital role" that indigenous peoples may play in achieving sustainable development "because of their knowledge and traditional practices" (A/CONF.151/26 (vol. I), annex I, principle 22). The Conference also called on Governments and intergovernmental organizations, "in full partnership with indigenous peoples", to take measures to recognize traditional forms of knowledge and enhance capacity-building for indigenous communities based on the adaptation and exchange of traditional knowledge (A/CONF.151/26 (vol. III), para. 26.3). It is the view of the Special Rapporteur that these conclusions and recommendations not only apply to indigenous knowledge which is narrowly biological, botanical or ecological but - in view of the special relationship that exists between indigenous peoples and their territories - to all aspects of indigenous peoples' heritage.

5. The Special Rapporteur has also been particularly mindful of the principle that "every people has the right and the duty to develop its culture", adopted by the General Conference of UNESCO in article 1 of the UNESCO Declaration of the Principles of International Cultural Co-operation (4 November 1966). The central role of traditional forms of cultural transmission and education has been stressed in the guidelines set out in the annex to the present report in the belief that this will be the most effective means of ensuring that indigenous peoples control the further development of their own heritage, as well as its interpretation and use by others.

6. In elaborating the principles and guidelines, contained in the annex to this report, the Special Rapporteur has drawn extensively on the Kari-Oca Declaration of the World Conference of Indigenous Peoples on Territory, Environment and Development (Kari-Oca, Brazil, 15-30 May 1992, and the Mataatua Declaration of the First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples. Their own conception of the nature of their heritage and their own ideas for ensuring the protection of their heritage are central to the "new partnership" with indigenous peoples symbolized by the International Year of the World's Indigenous People in 1993.

7. The Special Rapporteur wishes to underscore the fact, emphasized by the Mataatua Declaration, that indigenous peoples have repeatedly expressed their willingness to share their useful knowledge with all humanity, provided that their fundamental rights to define and control this knowledge are protected by the international community. Greater protection of the indigenous peoples' control over their own heritage will not, in the opinion of the Special Rapporteur, decrease the sharing of traditional cultural knowledge, arts and sciences with other peoples. On the contrary, indigenous peoples' willingness to share, teach, and interpret their heritage will increase.

8. In developing the principles and guidelines, the Special Rapporteur found it useful to bear in mind that the heritage of an indigenous people is not

merely a collection of objects, stories and ceremonies, but a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity. The diverse elements of an indigenous people's heritage can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including apprenticeship, ceremonies and practice. Simply recording words or images fails to capture the whole context and meaning of songs, rituals, arts or scientific and medical wisdom. This also underscores the central role of indigenous peoples' own languages, through which each people's heritage has traditionally been recorded and transmitted from generation to generation.

9. The Special Rapporteur also considers it fundamental to recognize and renew the central and indispensable role of land as the classroom in which the heritage of each indigenous people has traditionally been taught. Heritage is learned through a lifetime of personal experience travelling through and conducting ceremonies on the land. Much or all of an indigenous people's traditional territory must therefore remain accessible to and under the control of the people themselves, so that they can continue to teach, develop and renew their knowledge systems fully by their own means of cultural transmission. Indeed, ceremonies and traditional artistic works are regarded as means of renewing human relationships with the land, even as "deeds" to the territory, so that they can never be detached geographically, and used elsewhere, without completely losing their meaning.

10. This special relationship is not merely with the physical aspects of the land, but is conceived of as a direct and personal kinship with each of the species of animals and plants that co-exist with people in the same territory. Biological, zoological and botanical knowledge is not simply a matter of learning the names, habits and uses of species, but of carefully maintaining and periodically renewing ancient social and ceremonial relationships with each species. An indigenous person does not only harvest medicinal plants, for instance, but visits them, prays with them and, through ceremonies, helps them. For this reason, indigenous peoples do not believe that their knowledge of ecology, the uses of plants and animals, rituals or medicine can ever be alienated completely. Like human family relationships, these forms of knowledge are permanent and collective. They can be shared, however, under the right circumstances, with properly initiated persons.

Recommendations

11. The Special Rapporteur recommends that the Sub-Commission decide to request the Secretary-General to submit the attached principles and guidelines to indigenous peoples' organizations, Governments, specialized agencies and non-governmental organizations concerned for their comments. On the basis of these comments and those of the members of the Sub-Commission, the Special Rapporteur should be entrusted with presenting her final report to the Sub-Commission at its 47th session, in 1995, for the Sub-Commission to consider and adopt these principles and guidelines, as a first formal step towards committing the United Nations to the protection of indigenous peoples' heritage. With the support of indigenous peoples, these principles and guidelines may be transmitted to the General Assembly, through the Commission on Human Rights and the Economic and Social Council, for adoption.

12. In the context of developing the programme of activities for the United Nations Decade of the World's Indigenous People, proclaimed by the General Assembly in its resolution 48/163 of 21 December 1993, the Special Rapporteur encourages the convening of a series of practical workshops in this field, with the participation of professional, academic, and scientific experts and indigenous peoples, as previously recommended by the Working Group on Indigenous Populations (E/CN.4/Sub.2/1993/29, para. 225), as well as in her study (E/CN.4/Sub.2/1993/28, para. 181). Such workshops could be aimed at increasing awareness of and respect for indigenous peoples' heritage among researchers, scholars, legislators, representatives of Governments, business and industry, and educators, and at the development of model national legislation.

Annex

PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLES

PRINCIPLES

1. The effective protection of indigenous peoples' heritage will be of long-term benefit to all humanity. Cultural diversity contributes to the adaptability and creativity of the human species as a whole.

2. To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right and the duty of indigenous peoples to develop their own cultures and knowledge systems.

3. Indigenous peoples should be recognized as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past or developed by them in the future.

4. International recognition and respect for indigenous peoples' own customs, rules and practices for the transmission of their heritage to future generations, and for the sharing of their heritage with others, is essential to these peoples' enjoyment of human rights and dignity.

5. Indigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.

6. The discovery, use and teaching of indigenous peoples' knowledge, arts and cultures is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations and its full protection.

7. To protect their heritage indigenous peoples must control their own means of cultural transmission and education. This includes their right to the continued use and, wherever necessary, the restoration of their own languages and orthographies.

8. To protect their heritage indigenous peoples must also exercise control over all research conducted within their territories, or which uses their people as subjects of study.

9. The free and informed consent of the traditional owners should be an essential precondition of any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage.

10. Any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage must be revocable and ensure that the peoples concerned continue to be the primary beneficiaries of commercial application.

GUIDELINES

Definitions

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular peoples, clan or territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the phenotypes and genotypes of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape or audiotape.

13. Every element of an indigenous peoples' heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.

Transmission of heritage

14. Indigenous peoples' heritage should ordinarily be learned only by the means customarily employed by its traditional owners for teaching the specific knowledge concerned. Each indigenous people's rules and practices for the transmission of heritage and sharing of its use must be recognized generally in the national legal system.

15. In the event of a dispute over the custody or use of any element of an indigenous people's heritage, judicial and administrative bodies should be guided by the advice of indigenous elders who are recognized by the indigenous communities or peoples concerned as having specific knowledge of traditional laws.

16. Governments, international organizations and private institutions should support the development of educational, research and training centres which are controlled by indigenous communities, and strengthen these communities' capacity to document, protect, teach and apply all aspects of their heritage.

17. Governments, international organizations and private institutions should support the development of regional and global networks for the exchange of information and experience among indigenous peoples in the fields of science, culture, education and the arts. This may include electronic networks where feasible and appropriate.

18. Governments, with international cooperation, should provide the necessary financial resources and institutional support to ensure that every indigenous child has the opportunity to achieve both fluency and literacy in his/her own traditional language.

Recovery and restitution of heritage

19. Governments, with the assistance of international organizations, should assist indigenous peoples and communities in recovering control and possession of their moveable cultural property and other heritage.

20. In cooperation with indigenous peoples, UNESCO should establish a programme to mediate the recovery of moveable cultural property from across international borders, at the request of the traditional owners of the property concerned.

21. Human remains and associated funeral objects must be returned to their descendants and territories in a culturally appropriate manner, as determined by the indigenous peoples concerned. Documentation may be retained, displayed or otherwise used only in such form and manner as may be agreed upon with the peoples concerned.

22. Moveable cultural property should be returned wherever possible to its traditional owners, particularly if shown to be of significant cultural, religious or historical value to them. Moveable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.

23. Under no circumstances should objects or any other elements of an indigenous people's heritage be publicly displayed, except in a manner deemed appropriate by the peoples concerned.

24. In the case of objects or other elements of heritage which were removed or recorded in the past, the traditional owners of which can no longer be identified precisely, the traditional owners are presumed to be the entire people associated with the territory from which these objects were removed, or where the recordings were made, or the direct descendants of that people.

National programmes and legislation

25. National laws should guarantee that indigenous peoples can obtain prompt, effective and affordable judicial or administrative action to prevent, punish and obtain full restitution and compensation for the acquisition, documentation or use of their heritage without proper authorization of the traditional owners.

26. National laws should deny to any person or corporation the right to obtain patent, copyright, or other legal protection for any element of indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control and benefits.

27. National laws should ensure the labelling and correct attribution of indigenous peoples' artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trademark or an appellation of origin, authorized by the peoples or communities concerned.

28. National laws for the protection of indigenous peoples' heritage should be adopted following consultations with the peoples concerned, in particular the traditional owners and teachers of religious, sacred and spiritual knowledge, and wherever possible, should have the consent of the peoples concerned.

29. National laws should ensure that the use of traditional languages in education, arts and the mass media is respected and, to the extent possible, promoted and strengthened.

30. Governments should provide indigenous communities with financial and institutional support for the control of local education, through community-managed programmes, and with use of traditional pedagogy and languages.

31. Governments should take immediate steps, in cooperation with the indigenous peoples concerned, to identify sacred and ceremonial sites, including burial sites, and protect them from unauthorized entry or use.

Researchers and scholarly institutions

32. All researchers and scholarly institutions should take immediate steps to provide indigenous peoples and communities with comprehensive inventories of the cultural property, and documentation of indigenous peoples' heritage, which they may have in their custody.

33. Researchers and scholarly institutions should return all elements of indigenous peoples' heritage to the traditional owners upon demand, or obtain formal agreements with the traditional owners for the shared custody, use and interpretation of their heritage.

34. Researchers and scholarly institutions should decline any offers for the donation or sale of elements of indigenous peoples' heritage, unless they have first contacted the peoples or communities directly concerned and ascertaining the wishes of the traditional owners.

35. Researchers and scholarly institutions must refrain from engaging in any study of previously-undescribed species or cultivated varieties of plants, animals or microbes, or naturally-occurring pharmaceuticals, without first obtaining satisfactory documentation that the specimens were acquired with the consent of the traditional owners, if any.

36. Researchers must not publish information obtained from indigenous peoples or the results of research conducted on flora, fauna, microbes or materials discovered through the assistance of indigenous peoples, without identifying the traditional owners and obtaining their consent to publication.

37. Researchers should agree to an immediate moratorium on the Human Genome Diversity Project. Further research on the specific genotypes of indigenous peoples should be suspended unless and until broadly and publicly supported by indigenous peoples to the satisfaction of United Nations human rights organs.

38. Researchers and scholarly institutions should make every possible effort to increase indigenous peoples' access to all forms of medical, scientific and technical education, and participation in all research activities which may affect them or be of benefit to them.

39. Professional associations of scientists, engineers and scholars, in collaboration with indigenous peoples, should sponsor seminars and disseminate publications to promote ethical conduct in conformity with these guidelines and discipline members who act in contravention.

Business and industry

40. In dealings with indigenous peoples, business and industry should respect the same guidelines as researchers and scholarly institutions.

41. Business and industry should agree to an immediate moratorium on making contracts with indigenous peoples for the rights to discover, record and use previously-undescribed species or cultivated varieties of plants, animals or microbes, or naturally-occurring pharmaceuticals. No further contracts should be negotiated until indigenous peoples and communities themselves are capable of supervising and collaborating in the research process.

42. Business and industry should refrain from offering incentives to any individuals to claim traditional rights of ownership or leadership within an indigenous community, in violation of their trust within the community and the laws of the indigenous peoples concerned.

43. Business and industry should refrain from employing scientists or scholars to acquire and record traditional knowledge or other heritage of indigenous peoples in violation of these guidelines.

44. Business and industry should contribute financially and otherwise to the development of educational and research institutions controlled by indigenous peoples and communities.

45. All forms of tourism based on indigenous peoples' heritage must be restricted to activities which have the approval of the peoples and communities concerned, and which are conducted under their supervision and control.

Artists, writers and performers

46. Artists, writers and performers should refrain from incorporating elements derived from indigenous heritage into their works without the informed consent of the traditional owners.

47. Artists, writers and performers should support the full artistic and cultural development of indigenous peoples, and encourage public support for

the development and greater recognition of indigenous artists, writers and performers.

48. Artists, writers and performers should contribute, through their individual works and professional organizations, to greater public understanding and respect for the indigenous heritage associated with the country in which they live.

Public information and education

49. The mass media in all countries should take effective measures to promote understanding of and respect for indigenous peoples' heritage, in particular through special broadcasts and public-service programmes prepared in collaboration with indigenous peoples.

50. Journalists should respect the privacy of indigenous peoples, in particular concerning traditional religious, cultural and ceremonial activities, and refrain from exploiting or sensationalizing indigenous peoples' heritage.

51. Journalists should actively assist indigenous peoples in exposing any activities, public or private, which destroy or degrade indigenous peoples' heritage.

52. Educators should ensure that school curricula and textbooks teach understanding and respect for indigenous peoples' heritage and history and recognize the contribution of indigenous peoples to the creativity and cultural diversity of the country as a whole.

International organizations

53. The Secretary-General should publish an annual report, based upon information from all available sources, and in particular information requested from UNESCO, the World Intellectual Property Organization (WIPO) and indigenous communities, on problems and solutions experienced in the protection of indigenous peoples' heritage in all countries.

54. The Secretary-General should also prepare a note, in cooperation with indigenous peoples' organizations, on progress made and problems still to be overcome for the protection of indigenous peoples' heritage, for consideration by the World Summit for Social Development in 1995.

55. In cooperation with indigenous peoples, WIPO should bring these principles and guidelines to the attention of the member States of all of the intellectual and industrial property unions which are under its administration, with a view to promoting the strengthening of national legislation and international conventions in this field.

56. Indigenous peoples and their representative organizations should enjoy direct access to all relevant negotiations administered by WIPO and the World Trade Organization, to share their views on measures to improve the protection of their heritage through international law.

57. In collaboration with indigenous peoples, UNESCO should develop a list of sacred and ceremonial sites that require special measures for their protection and conservation, and provide financial and technical assistance to indigenous peoples for these purposes.

58. In collaboration with indigenous peoples, UNESCO should also establish a trust fund with a mandate to act as a global agent for the recovery of compensation for the unconsented or inappropriate use of indigenous peoples' heritage, and to provide assistance to indigenous peoples to strengthen their institutional capacity to protect their own heritage.

59. United Nations operational agencies, as well as the international financial institutions, and regional and bilateral development assistance programmes, should give priority to providing financial and technical support to indigenous communities for capacity-building and exchanges of experience focused on local control of research and education.